**CHIONG AH HUI**

**v.**

**BAN CHOON CO. PTE. LTD.**

HIGH COURT MALAYA, KUANTAN
LAMIN MOHD. YUNUS J
[CIVIL SUIT NO. 22-33-87]
10 FEBRUARY 1989

***CONTRACT:*** *Sale of land - Deposit paid and accepted - Variation of mode of payment of agreed purchase price - Whether contract validly concluded, legally binding and enforceable.*

These were two appeals by the defendant against the Senior Assistant Registrar's decision, firstly, in allowing summary judgment under O. 81 r. 1 of the Rules of the High Court 1980 and, secondly, in dismissing an application to strike out the plaintiff's claim.

On 23 July 1987, the plaintiff and defendant entered into and signed an agreement for the purchase of two pieces of land. Three of the essential conditions of this agreement namely paras. (a), (c) and (i) were as follows:

(a) That I (the plaintiff) pay a sum of RM50,000 as option money to your solicitors M/s. Jackson & Masacorale, Johore Bahru, Malaysia on the appointed day;

(c) That I (plaintiff) will pay RM500,000 (including RM50,000 option money) upon signing of the Sale & Purchase Agreement;

(i) That completion of sale will take place between a period of three (3) months subject to extension and subject to the legal documentation being completed; balance payment to be guaranteed by our bankers acceptable to ABN (Algemene Bank Nederland), interest at 10% per annum.

The plaintiff offered the sum of RM50,000 as part payment and deposit which was accepted and a receipt dated 29 July 1987 was issued. The defendant's solicitors on or about 12 July 1987 pursuant to the terms contained in the 23 July 1987 agreement prepared a draft agreement incorporating all the terms and conditions of the 23 July 1987 agreement with a minor variation as to the mode of payment of the agreed purchase price.

The plaintiff contended that the 23 July 1987 agreement was a valid contract supported by valuable consideration in the form of the option money of RM50,000 having been paid to the defendant for which a receipt was issued. The defendant maintained that the 23 July 1987 agreement could not be considered as a validly concluded contract between the parties.

**Held:**

**[1]** The agreement dated 23 July 1987 was a complete agreement valid in law and therefore enforceable. All the essential conditions were clearly stipulated in the said agreement including provision to guarantee the payment of the balance of the purchase price as in para. (i). The option money or deposit being one of the conditions had been paid and properly received.

**[2]** The signing of the Sale & Purchase Agreement as required by para. (c) is only a formality. There was no suggestion or inference that could be drawn from the provisions as set out in the said agreement that any of the terms could be re-negotiated or that either party could withdraw his or its agreement to any terms already agreed upon or that as a result of the withdrawal by either party to any of the terms would render the contract null and void.

*[Both appeals dismissed with costs.]*

**Cases referred to:**
*Ng Brothers Construction v. Kaolin (M) Sdn. Bhd. [1984] 2 CLJ (Rep) 280*
*Lim Keng Siong & Anor. v. Yeo Ah Tee [1983] CLJ (Rep) 231*
*Voo Syun Mui v. Yap Mooi Mooi [1984] 1 CLJ (Rep) 457*
*Koh Peng Moh v. Tan Chwee Boon [1962] 28 MLJ 353*
*Von Hatzfeldt Wildenburg v. Alexander [1912] 1 Ch 284*
*Low Kar Yit v. Mohd. Isa & Anor. [1963] MLJ 165*
*Tai Tong Realty Co. (Pte) Ltd. v. Galstaun & Anor. [1973] 2 MLJ 95*
*Yap Eng Thong & Anor. v. Faber Union Ltd. [1973] 1 MLJ 191*
*Ko Peng Moe v. Yahiya [1965] 31 MLJ 230*
*M.N. Guha Majumder v. R.E. Donough [1974] 2 MLJ 114*

**Legislation referred to:**
Rules of the High Court 1980, O. 81 r. 1

*For the defendant/appellant - Upali Masacorale; M/s. Jackson & Masacorale*
*For the plaintiff/respondent - J. Nadchatiram; M/s. J. Nadchatiram*

**JUDGMENT**

**Lamin Mohd. Yunus J:**

These are two appeals (encl. 16 and 17) by the defendant/appellant on the decisions of the learned Senior Assistant Registrar, firstly, in allowing the application by the plaintiff/respondent (encl. 10) for summary judgment under O. 81 r. 1 of the Rules of the High Court 1980 and, secondly, in dismissing his own application (encl. 11) to strike out the plaintiff's claim.

The plaintiff claimed that on 10 July 1987 he entered into an agreement for the purchase of two (2) pieces of land comprised in Pajakan Negeri Nombor 307 Lot 3289 and Pajakan Negeri Nombor 308 Lot 3290 in the Mukim of Triang, Temerloh, Pahang with a total area of 569.7636 acres at the price of RM2,800 per acre (see Exhibit 1 to encl. 15). Both parties signed the agreement. The defendant refused to accept the sum of RM50,000 when tendered by the plaintiff as deposit and part payment of the purchase price notwithstanding it being a term of the said agreement. Subsequently the defendant made a fresh offer of the sale price at RM3,100 per acre and the plaintiff accepted and both parties entered into a fresh agreement on 23 July 1987 (see Exhibit 2 to encl. 15). All the other conditions in the earlier agreement of 10 July 1987 were repeated in this agreement. So also the condition in regard to the part payment and deposit of RM50,000 which the plaintiff again offered and this time it was accepted and a receipt was issued dated 29 July 1987 (see Exhibit 3 to encl. 15). The agreement was also signed by both parties. It is this agreement of 23 July 1987 that the plaintiff is applying to be specifically performed.

On or about 12 July 1987 the defendant's solicitors pursuant to the terms contained in the agreement of the 23 July 1987 prepared a draft agreement incorporating all the terms and conditions of the 23 July agreement with a minor variation as to the mode of payment of the agreed purchase price. The plaintiff contended that the agreement of 23 July 1987 was a valid contract supported by valuable consideration in the form of the option money of RM50,000 having been paid to the defendant for which a receipt was issued. The defendant on the other hand maintained that the contract of 23 July 1987 could not be considered as a validly concluded contract between the parties. Below I repeat three of the essential conditions of 23 July agreement namely paras. (a), (c) and (i) as follows:

(a) That I (the plaintiff) pay a sum of RM50,000 as option money to your solicitors M/s. Jackson & Masacorale, Johore Bahru, Malaysia on the appointed day;

(c) That I (plaintiff) will pay RM500,000 (including RM50,000 option money) upon signing of the Sale & Purchase Agreement;

(i) That completion of sale will take place between a period of three (3) months subject to extension and subject to the legal documentation being completed; balance payment to be guaranteed by our bankers acceptable to ABN (Algemene Bank Nederland), interest at 10% per annum.

I propose to examine in some detail the following cases for the purpose of determining the issues before me. In the case of *Ng Brothers Construction v. Kaolin (M) Sdn. Bhd.* [1984] 2 CLJ (Rep) 280, the plaintiff company, in answer to a request by the defendant company for a quotation for the construction of a clay factory complex, by letter dated 15 December 1969 submitted his quotation with detailed plans. By a letter dated 27 December 1969 the defendant company accepted the quotation and in the same letter the defendant company informed the plaintiff company that at a later date it would be sending to complete the usual formality. The Court held that the letter of acceptance of 27 December 1969 created a binding contract between the parties. In the case of *Lim Keng Siong & Anor. v. Yeo Ah Tee* [1983] CLJ (Rep) 231 all the terms of the contract for the purchase of a piece of land together with buildings and machinery on it were orally agreed upon subject to written agreement to be drawn and executed. The Federal Court upheld the decision of the High Court below in that what was concluded orally on 3 March 1976 constituted a legally binding and enforceable agreement. In another case the Federal Court again confirmed the finding of the learned trial Judge and held that upon exercising the option to purchase the land concerned and a payment of 10% of the sale price having been paid there was already constituted a legally binding contract to sell the land: *Voo Syun Mui v. Yap Mooi Mooi* [1984] 1 CLJ (Rep) 457.

On the strength of the authorities above I am of the view that the agreement dated 23 July 1987 was a complete agreement valid in law and therefore enforceable. All the essential conditions were clearly stipulated in the said agreement including the provision to guarantee the payment of the balance of the purchase price as in para. (i). Having agreed to those terms the defendant then signed the said agreement. On 29 July 1987 the plaintiff paid the option money and was accepted for which a receipt was issued. The signing of the Sale & Purchase Agreement as required by para. (c) is only a formality. There was no suggestion or inference that could be drawn from the provisions as set out in the said agreement that any of the terms could be re-negotiated or that either party could withdraw his or its agreement to any terms already agreed upon or that as a result of the withdrawal by either party to any of the terms would render the contract null and void. Neither was there any of such suggestion made in the defendant's affidavit in particular that in encl. 14. Paragraph 6 of the said affidavit (encl. 14) merely alleges that there was the intention to make "adjustment" to the mode of payment and guarantees. But this was denied by the plaintiff (see para. 6 to encl. 15). This ought not to affect the validity of the agreement concluded on 23 July 1987. More importantly, the defendant by his letter of 6 August 1987 to his solicitors (Ex. 'TCN5' to encl. 11) expressly referred to the agreement of 23 July 1987 as "our agreement" and categorically requested his solicitors to inform the plaintiff that he "will stick to the terms and conditions under our agreement dated 23 July 1987." In the same letter the defendant imposed a new condition to the effect that failure to respond within seven days, then the contract would be terminated (His solicitors forwarded this letter to plaintiff's solicitors on 15 August 1987). This new condition in my view, must be looked at in the light of the defendant's letter dated the same day as his solicitors' letter i.e. 15 August 1987 to a third

person, a prospective buyer, informing him that he could not confirm the sale then as certain "legal technicalities" had first to be sorted out (Ex. 1 to encl. 26). I am convinced that the new condition of "seven days" was imposed merely to make it difficult for the plaintiff to proceed with the deal with the hope that eventually the plaintiff would abandon the contract thereby the land could be sold to the said prospective buyer who was prepared to pay more. It must also be noted here that the defendant did not reply to the plaintiff's allegation contained in his affidavit (encl. 26) in regard to the said letter (Ex. 1). I do not think that it is necessary for me to analyse the contract of all the correspondence exhibited in the affidavits of parties in this case. Having viewed them all, I am satisfied that the letter of agreement of 23 July 1987 was intended to be a binding contract for the sale of the land.

The defendant's Counsel however cited a number of authorities to support his contention that the so-called agreement of 23 July 1987 could not be a valid contract in law. With respect I do not think, on the facts, those cases can be of assistance to him. In the case of *Koh Peng Moh v. Tan Chwee Boon* [1962] 28 MLJ 353, the Court found there was no validly concluded contract for the sale between the parties in that the defendant did not sign the two copies of the contract. It was also clear from the letter of the plaintiff/Counsel of 13 June 1961, that there could only be a properly concluded contract that upon receipt of the deposit, the vendor was "to undertake" to return to the plaintiff/Counsel a copy of the contract duly signed by him which he never did. Communications dated 13 June 1961 and those as between the two parties were merely correspondence and their form and content were not like those as in the agreement of 23 July 1987. A conditional acceptance as was in the case of *Von Hatzfeldt Wildenburg v. Alexander* [1912] 1 Ch 284 could not be considered a complete contract. Similarly in the case of *Low Kar Yit v. Mohd. Isa & Anor.* [1963] MLJ 165, the option given to one Mohd. Yusuff to sell the land subject to conditions namely:

(a) that the option to be exercised in a certain manner;

(b) a form of contract had to be drawn and agreed upon by the plaintiff and the defendant; and

(c) the approval of the sale and of the said contract by the High Court at Kuala Lumpur.

Mohd. Yusuff duly exercised the option but defendant no. 2 (one of the administrators of deceased's estate) refused to execute the said contract. It was quite clear in this case that the agreement and the execution of the contract by both parties was an essential condition to the option. It may be observed here that the option was given to a third party and its purpose was primarily to pave the way for the parties to negotiate the terms of the sale agreement. In *Tai Tong Realty Co. (Pte) Ltd. v. Galstaun & Anor.* [1973] 2 MLJ 95, the appellants were given an option to purchase the respondent's property. It was a written option and the first of the terms stated that "the sale is subject to contract". It was a matter of construing the intention of the parties from the documents and letter relied on. In this case the Court came to the conclusion that there was no binding contract to sell the property. Also in the case of *Yap Eng Thong & Anor. v. Faber Union Ltd.* [1973] 1 MLJ 191, the terms of the agreement and the facts of the case themselves could not come in aid of the plaintiff's claim for damages for any breach of contract by the defendants. The said agreement was signed by the plaintiff on 21 July 1969 for the purchase of a semi-detached bungalow at the price of RM57,500 and option money of RM500 was paid on the conditions that:

(a) within six weeks from the date hereof the plaintiffs shall sign an agreement of sale with the owners, and send the same together with the payment to the owners' solicitors ...

(b) for failing to comply with the requirement in (a) the owners would be at liberty to sell the said property to any prospective buyer without notice to the plaintiff in which case the option money of RM500 already paid would be forfeited.

The plaintiffs did not sign the agreement of sale neither did they send the same to the solicitors of the owners within six weeks as required. Time was of the essence of this agreement of 21 July 1969 and the owners accordingly became entitled to sell the property without notice to the plaintiffs. The owners exercised that power and called off the sale on 12 November 1969 because of the failure of the plaintiffs to sign the agreement. The Court held that those facts alone were sufficient to defeat the plaintiffs' claim. From the evidence there was no doubt that the plaintiffs had agreed to sign the agreement but there was in fact a dispute as to what the agreement of sale should contain. Also when material conditions are still being negotiated, no binding contract has been made notwithstanding the fact that a willing and able purchaser had been introduced to the vendor: *Ko Peng Moe v. Yahiya* [1965] 31 MLJ 230. If the evidence shows that the parties do not intend to be immediately bound and only negotiations take place from beginning to end, there will be no binding contract between them: *M.N. Guha Majumder v. R.E. Donough* [1974] 2 MLJ 114. In the present case before me all the essential conditions were clearly set out in the document of 23 July 1987 to which both parties had agreed and put down their signatures. The option money or deposit being one of the conditions had been paid and properly received. There was nothing more to be said. It was a complete agreement in itself. I therefore found in favour of the plaintiff and dismissed both the defendant's appeals with costs.

Also found at [1989] 1 CLJ 1059